U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M- CORP.

DATE: MAY 12, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of software development and support services, seeks to permanently employ the Beneficiary as a lead information systems analyst. It seeks classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition on November 6, 2015. The Director concluded that the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), did not demonstrate that the job requires a professional with an advanced degree or the equivalent.

The matter is now before us on appeal. The Petitioner asserts that the Director misinterpreted the job requirements stated on the accompanying labor certification. Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

A. The Roles of DOL and USCIS in the Employment-Based Immigration Process

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the DOL. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, the foreign national must apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

By approving the accompanying labor certification in the instant case, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(II).

In these visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified on a labor certification and the requirements of the requested immigrant classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984) (holding that the immigration service has authority to make preference classification decisions); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (same).

B. The Requirements for an Advanced Degree Professional

A petition for an advanced degree professional must be accompanied by a valid, individual labor certification, an application for Schedule A designation, or documentation of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(k)(4)(i). The job offer portion of a labor certification must demonstrate that the job requires a professional holding an advanced degree or the equivalent. *Id.*

The term "advanced degree" means "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." 8 C.F.R. § 204.5(k)(2).

The regulation at 8 C.F.R. § 204.5(k)(2) uses the term "degree," indicating that a professional with the equivalent of an advanced degree must possess a single U.S. bachelor's degree or foreign equivalent degree, without combining experience or lesser educational degrees. *Cf.* 8 C.F.R. § 204.5(k)(3)(ii)(A) (allowing "a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning" to demonstrate qualifications as an "alien of exceptional ability").

Legislative history also supports Congressional intention to require a single, uncombined bachelor's degree for advanced degree professional purposes. In "considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 101-955 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6784, 6786. The former Immigration and Nationality Service found that "both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, an alien must have at least a bachelor's degree." Final Rule for Immigrant Visa Petitions, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991); *see also SnapNames.com, Inc. v. Chertoff*, No. CV 06-65-MO, 2006 WL 3491005, **10-11 (D. Or. Nov. 30, 2006) (upholding our determination that beneficiaries of immigrant visa petitions seeking classification as professionals or advanced degree professionals are statutorily required to hold at least a single baccalaureate degree).

Thus, in the instant case, the job offer portion of the accompanying labor certification must demonstrate that the job requires a single U.S. bachelor's degree or foreign equivalent degree, without combining experience or lesser educational degrees, followed by 5 years of progressive experience in the specialty.

C. The Requirements Stated on the Accompanying Labor Certification

We must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the accompanying labor certification states the primary requirements of the offered position of lead information systems analyst as a U.S. master's degree or foreign equivalent degree in computer science, computer application, computer engineering, computer information systems, electronic engineering, engineering, or a related field, plus 24 months of experience in the job offered or as a project lead, software engineer, or related occupation. The labor certification also states that the Petitioner will accept an alternate combination of education and experience in the form of a bachelor's degree plus 5 years of experience.

Further, Part H.14 of the accompanying ETA Form 9089, which lists "[s]pecific skills or other requirements," states:

> Any suitable combination of education and experience is acceptable such as a Bachelor's degree or foreign equivalent plus five years of progressive experience, OR Master's degree or foreign equivalent plus two years of experience. Will accept a bachelor's degree equivalent based on a combination of degrees as determined by a qualified evaluation service.

As the Director found, Part H.14 of the job offer portion of the accompanying labor certification indicates the Petitioner's acceptance of a bachelor's degree equivalency "based on a combination of degrees." As previously discussed, the regulations and legislative history indicate that an advanced degree professional must possess a single U.S. bachelor's degree or foreign equivalent degree without combining experience or lesser educational degrees. The job offer portion of the labor certification therefore does not demonstrate that the offered position requires a professional holding an advanced degree or the equivalent.

The Petitioner asserts that we misinterpret its requirements on the accompanying labor certification. The Petitioner states that Part H.8-A of the ETA Form 9089 clearly indicates that the offered position requires at least a bachelor's degree or a foreign equivalent degree. The Petitioner states that the information in Part H.14 of the form does not indicate the Petitioner's acceptance of lesser degrees and was "intended to clarify and not contradict" other information in the job offer section of the form. The

Petitioner states: "It is our position that notwithstanding the language listed on ETA-9089, item H.14, there is only the primary requirement (H.4) and alternative requirement (H.8)."

However, as previously discussed, we may not disregard terms of a labor certification. *See, e.g., Madany*, 696 F.2d at 1015 (stating that "it is the language of the labor certification job requirements that will set the bounds of the . . . burden of proof"). We must therefore consider the language in Part H.14 of the ETA Form 9089 when determining the minimum job requirements of the offered position. Although Part H.8-A of the form states that a bachelor's degree is required, Part H.14 indicates that the equivalency of a bachelor's degree can include a "combination of degrees."

The Petitioner asserts that a "combination of degrees" in Part H.14 does not mean a combination of lesser degrees. It states that USCIS will accept a combination of foreign degrees - such as a 3-year bachelor's degree and a 2-year master's degree, or a 3-year bachelor's degree and a 3-year master's degree - as the equivalent of a U.S. bachelor's degree.

However, in the examples cited by the Petitioner, the foreign master's degrees equate to U.S. bachelor's degrees on their own. Therefore, beneficiaries with those credentials possess single degrees equivalent to U.S. bachelor's degrees. In contrast, the statement in Part H.14 of the ETA Form 9089 suggests the Petitioner's acceptance of a combination of lesser degrees - such as multiple associate's degrees - to equal a bachelor's degree.

The Petitioner provided documentation of its recruitment efforts during labor certification proceedings, including copies of its notice of filing, job order with a state workforce agency, and newspaper advertisements. It asserts that the materials demonstrate that the offered position requires at least a bachelor's degree.

However, the recruitment documentation is inconclusive regarding the position's minimum job requirements. The materials state the Petitioner's acceptance of a bachelor's degree or its equivalent, without specifying the nature of the equivalency. The recruitment materials therefore do not establish a single U.S. bachelor's degree or a foreign equivalent degree as a minimum job requirement of the offered position.

The Petitioner also asserts that the Director, before denying its petition, should have issued a request for evidence or notice of intent to deny. The Petitioner asserts that it could have submitted evidence demonstrating that the offered position requires at least a bachelor's degree.

The Petitioner had an opportunity for rebuttal on appeal and submitted additional evidence, which we have considered. We therefore decline to withdraw the Director's decision or remand the matter.

For the foregoing reasons, the job offer portion of the accompanying labor certification does not demonstrate that the offered position requires a professional holding an advanced degree or its equivalent. We will therefore affirm the Director's decision and dismiss the appeal.

D. The Beneficiary's Qualifying Experience

Although not addressed by the Director, we independently note that the record also does not establish the Beneficiary's qualifying experience for the offered position.

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. As previously indicated, we may neither ignore a term of the labor certification, nor impose additional requirements. *See Irvine,* 699 F.2d at 1009; *Madany,* 696 F.2d at 1012-13; *Stewart,* 661 F.2d at 3.

In the instant case, the petition's priority date is January 7, 2015, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d). As previously indicated, the accompanying labor certification states the basic minimum requirements of the offered position of lead information systems analyst as a U.S. master's degree or foreign equivalent degree and 24 months of experience, or a U.S. Bachelor's degree or foreign equivalent degree followed by 5 years of experience.

The Petitioner asserts that the Beneficiary has the foreign equivalent of a U.S bachelor's degree followed by 5 years, or 60 months, of experience. The Beneficiary's educational qualifications are not at issue.

The Beneficiary attested on the accompanying labor certification to about 65 months of full-time, qualifying experience, excluding experience gained with the Petitioner in the United States. The Beneficiary stated the following experience:

- About 3 months as a developer with [redacted] in the United States from July 21, 2014 to October 24, 2014;
- About 15 months as a delivery module lead with the Petitioner's affiliated company in India from December 28, 2009 to March 20, 2011.
- About 5 months as an associate-IT consultant with [redacted] in India from July 18, 2009 to December 24, 2009.
- About 19 months as a team member with [redacted] in India (now known as [redacted] from November 12 2007 to June 10,2009;
- About 14 months as a software designer with [redacted] in India from June 19, 2006 to August 9, 2007; and
- About 9 months as a software developer with [redacted] in India from September 21, 2005 to June 7, 2006.

A petitioner must support a beneficiary's claimed qualifying experience with letters from employers. 8 C.F.R. § 204.5(g)(1). The letters must provide the names, addresses, and titles of the employer, and descriptions of a beneficiary's experience. *Id.*

In the instant case, the Petitioner provided letters from all the former employers stated by the Beneficiary on the accompanying labor certification, confirming his positions and dates of employment. However, the letters from and do not describe the Beneficiary's experience pursuant to 8 C.F.R. § 204.5(g)(1). The record therefore does not establish the Beneficiary's possession of at least 60 months of qualifying experience.

The Petitioner also provided an affidavit from a purported coworker of the Beneficiary's at describing the Beneficiary's purported duties at the company. However, a petitioner must demonstrate the unavailability of required evidence before we may consider such secondary evidence. 8 C.F.R. § 103.2(b)(2)(i). The instant record does not establish the unavailability of the required letter from describing the Beneficiary's experience. We may therefore not consider the affidavit from the Beneficiary's purported coworker.

The record does not establish the Beneficiary's possession of at least 60 months of qualifying experience as specified on the accompanying labor certification by the petition's priority date. We will therefore dismiss the appeal for this additional reason.

II. CONCLUSION

The job offer portion of the accompanying labor certification does not demonstrate that the offered position requires a professional holding an advanced degree or its equivalent. We will therefore affirm the Director's decision and dismiss the appeal. The record also does not establish the Beneficiary's possession of the qualifying experience specified on the accompanying labor certification by the petition's priority date. We will also dismiss the appeal for this reason.

The petition will be denied for the above-stated reasons, with each considered an independent and alternate ground of denial. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the instant Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of M- Corp.*, ID# 17406 (AAO May 12, 2016)